No. 3705

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ALASKA PACKERS ASSOCIATION
(a corporation),
Plaintiff in Error,

vs.

D. J. GOVER,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

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I.

STATEMENT OF FACTS.

This case comes to this court upon a writ of error to the United States District Court of the District of Alaska, Division Number One, directed to a judgment entered in favor of the plaintiff in the sum of ten thousand dollars. Throughout this brief we shall use the terms "plaintiff" and "defendant" as referring to the parties as they were aligned in the court below.

The action is one for personal injuries claimed to have been sustained by plaintiff under the following circumstances: the defendant, which is a

corporation engaged in the business of canning salmon and marketing its product, maintains a hatchery for the propagation of salmon located at a place 7 or 8 miles from Loring in Southern Alaska. The plaintiff in July, 1919, was employed by defendant to work at this hatchery, and he commenced work there on July 6th as a common laborer in and about the hatchery. His work was to cut wood and do general all-around work (p. 18). On April 19, 1920, and in the forenoon of that day, plaintiff was engaged in building a fence at the hatchery, and in the afternoon he was directed by Patching, the superintendent of the hatchery, to get some boards down from an old flume, which boards were to be used in repairing or building the fence. This flume had been constructed for the purpose of conducting water to run a small sawmill which the defendant had operated at one time. This sawmill was not in operation on April 19th, and had not been operated for a long time (pp. 94-96). The top of the flume near its terminal point was about twenty-five feet from the ground, and was reached by a vertical ladder. This ladder was constructed of uprights 2x6. The rungs or steps were 1x4, and were twenty-four inches long (p. 95). Each rung was fastened to the uprights with three spikes at each end, and the top rung of the ladder was twenty-five feet from the ground. At the bottom of the ladder there was a walk, made of three pieces of 4x8 timber, which led to a tramway seven feet and two

inches distant from the bottom of the ladder (p. 103). This tramway ran parallel to the flume.

The plaintiff testified (p. 22) that Mr. Patching told him to go up on the ladder and get a rope and a peavey to loosen the boards. Plaintiff did so and worked at this task until about a quarter to four of the afternoon. He ascended the ladder, pried off the boards on top, and then lowered the boards one by one to the ground (p. 43). In the case of each board he descended the ladder, removed the rope and re-ascended to lower another board. The plaintiff testified that he had been up and down the ladder at least three times. Patching testified that he must have been up and down the ladder at least seven times (p. 113) from the number of boards that had been removed from the flume. Plaintiff testified that as he was making the last of these descents, and while he had his feet on about the fourth rung from the top of the ladder, the top rung upon which his right hand rested pulled out, and that he fell backwards down to the ground, striking the edge of the tramway. It is for the injuries thus sustained that plaintiff sues. No bones were broken or sprains suffered, and no discoverable objective bruises resulted. At the time he fell plaintiff had no load, the boards having been lowered by the means of the rope, and therefore the use of his arms and legs in descending the ladder was unimpeded.

Plaintiff testified that he was very nearly paralyzed by the fall and could not use an arm or his legs, and (p. 28):

"I hurt so bad that I don't think a man could hurt any worse,—I don't see how he could.
"Q. Did you suffer much pain?
"A. Indeed I did."

The only evidence introduced by the plaintiff as to the condition of the ladder was that given by the plaintiff himself, in which he said (p. 42.) that he noticed "a little board" was lying there after he fell to the ground; that the board was lying there and the nails were out, and that on one side he could see rotten wood between the spikes (p. 24). This was at the time when plaintiff claims he was suffering great physical pain and was very nearly paralyzed.

The defendant finds itself in an unfortunate position in regard to this case. There were no witnesses to the accident, and any proof of negligence rests on the evidence of the plaintiff alone. The extent of the injuries received is based upon plaintiff's testimony as to his subjective symptoms. The amount of the verdict excites surprise when it is considered that the plaintiff was a man of sixty-eight years of age at the time the accident occurred, and that he had had uncertain employment, his earning capacity when working at the time of the accident $3.85 a day and board. In addition to the excessive amount of the verdict the defendant is confronted with the peculiar nature of the testimony produced by plaintiff in order to establish his alleged injuries. Frequently cases arise where either the circumstances of the accident or the extent or nature of the injuries suffered must be established upon the testimony of the plaintiff alone.

It rarely happens, however, as it has in this case, that the defendant must face both these circumstances, for not only does the only evidence with regard to the facts of the accident rest upon the unsupported testimony of the plaintiff, but all of the testimony concerning the extent and nature of his injuries is based upon his self-diagnosis. None of the medical witnesses gave any testimony as to any substantial objective symptoms which could be traced to his fall, and plaintiff testified (p. 45) that there were no cuts—bones broken or bruises even except "a green spot"—He gave as an explanation that "he had on pretty considerable clothes" (p. 45).

The plaintiff, after the fall, remained over a month at the hatchery, notwithstanding that defendant's superintendent frequently asked him if he desired to go to Ketchikan (p. 107), and if so, that he would take him out; that plaintiff said that he did not think it was necessary. When he did come out, which was about the first of June, 1920, he went to see Dr. Ellis, who testified (p. 130) as to the nature of plaintiff's condition when he saw him. He testified (p. 131) that he found no evidence of external injury. The compensation of Dr. Ellis was paid by the defendant Association, and plaintiff continued to go to him until some time about July 1st or 2nd, when plaintiff of his own accord quit going to see him. Dr. Ellis testified that, in his opinion, it would have been impossible for a man of the age of plaintiff to fall the distance that he claims he fell, without breaking or dislocating some bones, or having a bruise or dis-

coloration. Dr. Mustard testified in plaintiff's behalf (pp. 65-79). He states that he made an examination about the first of July and found a reddish area looking like a recent contusion over the left sacral joint, and a point of considerable tenderness on the spinal column between the eleventh and twelfth dorsal vertebrae; that he had examined plaintiff since, and that at the present time the contusion was still marked by a round brownish pigmented area the size of perhaps a dollar; that the tenderness between the eleventh and twelfth vertebrae was quite marked, and that the large muscles of the buttocks on the right side were wasted and shrunken. It will be observed that the testimony of Dr. Mustard is practically wholly based upon the subjective symptoms of the plaintiff. His evidence as to any objective symptoms is the testimony as to the reddish area about the size of a dollar over the left sacral joint. He did not observe any fracture (p. 76) and when asked if it would be possible for a man of plaintiff's age to fall twenty-five feet and strike a hard substance such as a tramway without breaking a bone, he said (p. 76), "If I were betting, I would bet the other way."

This brief summary of the evidence will disclose that the facts of this case lie within a narrow compass and that the points at issue which are presented to this court are quite simple. Plaintiff, who had followed many desultory occupations, while of the age of sixty-eight years was employed to do general all-around work at this hatchery. The hatchery, its

buildings and equipment were of no complicated character, and the plaintiff worked there from July, 1919, until April, 1920, at general work. He claims to have been injured while descending a ladder attached to the flume. This ladder and flume was directly at the hatchery, and must have been thoroughly known to plaintiff during the eight or nine months of his work there. The ladder had been used frequently by other employes of the hatchery, and had been tested by Patching, the superintendent, just before the plaintiff started to take away these boards. After about two hours of work, plaintiff was found at the bottom of the ladder with the upper rung detached, and he claims that he was precipitated to the ground by reason of the rung breaking loose. He was given such attention as was possible under the circumstances, but no bruises, dislocations or breaks were discovered upon his body. Plaintiff remained at the hatchery, although defendant offered to take him out to Ketchikan if he so desired. During this time no bruises upon his body appeared. About six weeks after the accident plaintiff went down to Loring, and from there to Ketchikan. Arriving at the latter place, he consulted Dr. Ellis, who was the defendant's physician. Dr. Ellis testified that he could not find any bones broken, but that he thought the patient might be suffering from rheumatism. After treating with Dr. Ellis for some time the plaintiff left him and went to Dr. Mustard. This was on or about July 1st, two months and a half after the alleged accident. Dr. Mustard testi-

fied as to the contusion above referred to and the tenderness between the eleventh and twelfth dorsal vertebrae. Reasoning backward from the condition of the plaintiff as he found him, the Doctor testified that, assuming that the plaintiff had received the injury described, this injury might have been the cause of his internal condition as he found it (p. 70). The testimony of Dr. Mustard may be summarized to the effect that if the plaintiff were suffering from the internal symptoms which he, the patient described, then they might have been due to an injury to his spinal cord, and that this cord might have been injured without breaking any bones.

II.

THE DISTRICT COURT ERRED IN REFUSING TO GRANT THE REQUEST OF DEFENDANT FOR AN INSTRUCTED VERDICT (page 186), FOR THE REASON THAT THE LADDER WAS A SIMPLE TOOL, AND THE DANGERS GROWING OUT OF DEFECTS THEREIN, IF ANY, WERE ASSUMED BY THE EMPLOYEE.

We concede the general rule to be that an employer is bound to furnish his employee with a reasonably safe place in which to work, and to furnish him with reasonably safe tools and appliances. There is, however, a well-recognized exception to this rule to the effect that where the tools furnished are of a simple nature and the defects therein are

as easily discoverable by the servant as by the master, the master cannot be held liable for injuries which arise from such defects. No citation of authority is necessary to show this well-established exception to the rule.

Defendant requested (p. 190) an instruction as to this simple tool doctrine but this was refused and an exception noted (p. 205).

There are numerous cases which hold that this exception to the general rule applies to ladders, and, in many cases, decided in divers jurisdictions in this country, a ladder has been held to be a simple tool or appliance.

One of the first of these cases is *Cahill v. Hilton* (N. Y.), 13 N. E. 339. In that case the court reversed a judgment in favor of the plaintiff where it appeared that the accident occurred by reason of the collapse of a ladder, the court saying:

> "A ladder, like a spade or hoe, is an implement of simple structure, presenting no complicated question of power, motion, or construction, and intelligible in all of its parts to the dullest intellect. No reason can be perceived why the plaintiff, brought into daily contact with the tools used by him, as he was, should not be held chargeable, equally with the defendants, with knowledge of their imperfections."

Another instance of a reversal of a judgment under like circumstances is *Nosal v. International Harvester Co.,* 187 Ill. App. 411. In that case the

court held that where a ladder,—which is a simple and ordinary tool, the nature of which is easily understood—is used by a servant who is familiar with it, the servant in using the same is conclusively presumed to assume the risk of all defects therein, whether patent or latent, and whether the master knows of such defects, or could have known of them by the exercise of reasonable care, or not.

In *Sivley v. Nixon Mining Drill Co.* (Tenn.), 164 S. W. 772, the judgment for the plaintiff was reversed where the injury arose out of the use of a defective ladder supplied by the employer, the court saying:

> "It has been ruled by courts, quite without exception, that an ordinary ladder falls within the class of simple tools in respect of a defect in which the employer is held not liable, on the ground that a defect in such a simple tool must be obvious to its user, by whom any risk of danger therefrom must be held to be assumed."

The same rule is laid down in *Christy v. Southwestern Missouri Ry. Co.* (Mo.), 110 S. W. 694. The following language was used by the court in the opinion:

> "But, be that as it may, he describes the ladder in such way as to show that its condition would have suggested to any one that it could not be used without imminent risk. His experience with it enabled him to know its condition better than anyone else. It was a simple appliance, so old, scarred and patched as to carry on its face a warning to the most thoughtless and indifferent."

The following cases also deal with the classification of a ladder as a simple tool, and reach the same conclusion as the authorities above quoted:

McKay v. Hand (Mass.), 47 N. E. 104;

McGill v. Cleveland etc. Co. (Ohio), 86 N. E. 989;

Blundell v. Wm. A. Miller Elevator Mfg. Co. (Mo.), 88 S. W. 103.

In California, while the question of whether or not a ladder comes within the "simple tools" doctrine appears never to have been decided, it has been held that a scaffold somewhat in the nature of a ladder is governed by the same principles. That case was *McNamara v. Macdonough,* 102 Cal. 575. The Supreme Court of California approved the following instruction which had been given by the trial court:

> "An employer who provides appliances, such as a scaffold, as in this case, must see that it is suitable and fit for the use for which it is intended. This rule is, however, subject to this limitation: That when a person works upon a platform or scaffold—as the plaintiff did in this case—and such platform or scaffold is insufficient for the purpose for which it is used, or for any reason unsafe or dangerous to work upon, and such person so uses it or works upon it with a knowledge, or means of knowledge, equal to that of the employer, that it is defectively constructed, unsafe, and dangerous to work upon, then, in that case, he takes the risk incident to such employment, and cannot recover against such employer for injuries sustained which arise out of accidents resulting from such defective, unsafe, and dangerous condition of such scaffold."

We have no doubt that counsel will cite in opposition to this contention the case of *Pacific Telephone & Telegraph Co. v. Starr,* 206 Fed. 157. It is very natural that this case should be cited because it is a decision of this court, and the question of whether or not a ladder is a simple tool or appliance is therein discussed. The plaintiff there was injured by the collapse of an improvised ladder which had been made by lashing together two smaller ladders borrowed from persons along the line of the defendant's telephone system. The work in which plaintiff was engaged for defendant was the construction and care of telephone wires, which necessitated the constant use of very *high* ladders. Ordinarily, such high ladders were furnished by the company, but there was not always a sufficient number of them available, in which case others were borrowed and if necessary spliced together. Plaintiff was precipitated to the ground by the breaking of a rung of an improvised ladder which rung was cross-grained. The jury's verdict was for the plaintiff, and the defendant, upon appeal, contended that the ladder in question was a simple tool or appliance, and that the employee, therefore, assumed the risk of its use. This court, in refusing to apply such doctrine to the facts established affirmed the judgment of the lower court. This affirmance is very clearly based upon two grounds, neither of which exists in the case at bar. First, is it recognized that a ladder may be a simple tool or appliance, the court saying:

> "Counsel next insist that a ladder is a simple appliance—that is, of a class with the ordinary carpenter's or mechanic's tools—and that accidents occasioned by the use of such simple appliances are not actionable. Many authorities are cited in support of this proposition, but their application is not apparent, *when the nature of the work in which these men were engaged* and *the kind of ladders required* for their service are taken into account."

Then it was said that because of the peculiar nature of the work which the plaintiff was engaged to perform, to wit: the constant use of ladders of an especial kind and design, which were necessary in the daily business of the company, the exception to the general rule did not apply, and that the particular ladders in question were not simple tools. Said this court:

> "This required the use of ladders not of the ordinary kind, such as stepladders and short contrivances used about the house or by mechanics about their general work, but ladders of more than the ordinary length, and extension ladders calculated to reach high positions, which could be used with safety by men doing that character of work. *These are the kind of appliances, and not the simple or ordinary kind,* that the company was supposed to furnish for the use of the men engaged in the particular work in hand. And it was the attempt to supply a long ladder, one of unusual length, that led to the accident complained of. So it is not apparent that the doctrine sought to be invoked has application here."

It thus appears that the Starr case is not controlling in that the facts disclose that the ladder there

used was not the ordinary simple contrivance which was used in the cases above referred to as establishing the doctrine of a ladder as being a simple tool or of the simple nature of the ladder used in the present case. To the contrary, this decision is persuasive in favor of the defendant here because it is, in part at least, based upon a lack of inspection by the defendant's foreman. The measure of care devolving upon the master is said to be

> "reasonable care and precaution in furnishing to his employes reasonably safe tools and implements with which to do their work. The duty is not absolute to provide reasonably safe tools and implements, for he is not an insurer on that score, but to exercise reasonable care and forethought in providing such tools and implements as are reasonably suitable and safe for the work. When he has done this, he has discharged his bounden duty to his servants and employes. This duty imposes upon the master the responsibility of inspecting these instrumentalities to determine their safety, and here again he may be excused for a failure to discover defects, if he has been reasonably careful and diligent in making the inspection; but he is not to be excused in failure to make any inspection at all. If a tool or appliance is defective, and the defect is discoverable upon a careful scrutiny and examination, such as a reasonably prudent and careful man would make under like circumstances, the master would be at fault in furnishing such a tool or appliance to his workmen, and his failure to inspect could not help him. It would injure him, rather, as he would be guilty of a neglect of duty. *If, however, the defect was latent in character, and not ordinarily discoverable by reasonable inspection, then he could not be held accountable.* The duty to make the

> inspection, however, would remain, though, if the defect was of that character that a reasonable inspection would not disclose it, there could, of course, be no liability for failing to inspect."

This brings us to the next point of argument upon which it is urged that the judgment below is erroneous, viz., that it does here appear, without contradiction, that an adequate inspection had been made of this ladder.

This was made by the superintendent of the hatchery himself upon the morning of April 19th immediately prior to plaintiff's first trip up to the flume. Mr. Patching at that time went all the way from the ground to the top of the flume, putting his weight on each rung, and discovered no weakness (see Tr. p. 96). That this was more than a mere inspection and was a real test in fact was shown in that Patching weighed at that time at least 220 pounds; and that he had personally been up and down this ladder many times prior to April 19, 1920.

Mr. Patching also testified that he had inspected the ladder in a like manner at numerous times before, and that it had been constructed of new lumber, under his supervision, only eight or nine years prior to the accident (see Tr. p. 117). He further testified that the entire ladder, including the rung which came off on April 19th, was in good condition at the time of the accident (p. 96).

Therefore, taking this uncontradicted testimony it is clear that adequate, not to say extraordinary,

inspection of the appliance was made, and the condition found to be good.

If, on the other hand, the testimony of plaintiff himself be looked to in this connection, it is equally clear that no liability can rightfully be fastened upon defendant, for the reason that if the condition of the ladder was such as he testified then the defects were such as he must be deemed to have *assumed.*

The condition of the record in this regard is unusual. In order to substantiate his case, the plaintiff sought to be *qualified and was qualified as an expert* in judging the age and strength of wood (p. 86). If he was such expert at the time of the trial, he must also have possessed like qualifications on the day that he was injured.

We thus have presented a case where a man who is an expert in a knowledge of the duration of usefulness and strength of spruce wood goes up and down this ladder in daylight a considerable number of times—it is immaterial whether it was three or seven times—and on his final trip down is injured by pulling out the top rung. That notwithstanding the fact that as he claims, he was "writhing in agony" at the bottom of the ladder, he was able casually to observe the rotten condition of the wood of the upright as it was disclosed by the fallen rung, which he saw on the ground. If while, as he says, he was practically paralyzed, the condition of the wood was so apparent that it impressed itself upon his mind at that critical time, then it is obvious that a

reasonably careful man, an expert in such matters, would have known the condition of this rung when in place and upon the occasions of his many actual uses of the ladder in the two hours preceding the accident. The plaintiff does not stand in the position of one who was ignorant of the risk of danger to which he was exposed. To the contrary, and as a part of his case in chief, he qualified, over the objection of the defendant, as an expert in this regard. He should have known, therefore, more than Patching or anyone else could have known of the danger. If, therefore, the defect in question was *patent* in character, the plaintiff must have observed it, or be deemed in law to have observed it. In such case it was his duty either not to ascend the ladder further until the defect had been remedied, or to have taken precautions against the rotten rung. The act of climbing a ladder such as this is one of the simplest operations possible. Plaintiff claims that his right hand only was on the rung which pulled off. Where was the left hand? His feet were firmly placed upon the fourth rung and did not slip. The slightest attention to his movements must have protected plaintiff, as a child of tender years would have been perfectly able to grasp another rung or the side of the upright instead of this alleged defective rung.

To the contrary, if the defect in this rung was *latent* in character and was not ordinarily discoverable by a reasonable inspection, then under the direct ruling in the Starr case, the master "could not be held accountable". It obviously was not neces-

sary that the defendant pry off each one of these rungs of the ladder to see if there were defects before any employee used it; such requirement would demand more than reasonable care. It is difficult to see what the defendant could have done in regard to this ladder that he did not do. Its superintendent had used it a short time before the accident; he and other employes had frequently used it in the past and, finally, the plaintiff himself had, by reason of his employment at the time, peculiar facilities for testing the ladder and observing its condition.

Plaintiff is therefore confronted with a dilemma. If the wood was as patently rotten as he claims, he as an expert on woods, should have noticed this and protected himself. If, however, the defect was merely latent, under the ruling in the Starr case, defendant was required only to make a reasonable inspection.

At the conclusion of plaintiff's case in chief (p. 79), defendant moved the court to dismiss the case and grant a nonsuit for the reason he had not established that the defendant was in any particular negligent, or that the accident—if an accident occurred—happened through any act of the defendant that would make it liable to him in any degree for damages. After this motion was made, the plaintiff, by permission of court, was recalled to the stand and testified. Thereupon the motion for a nonsuit (p. 92) was denied and exception noted. At the close of the testimony, defendant renewed this

motion (p. 186) and moved the court to instruct the jury to find a verdict for the defendant upon the ground that there had been no negligence shown. The ruling upon this motion is assigned as error. Later a motion for judgment for the defendant was made (p. 207) upon the ground that the verdict was contrary to the law and the evidence, and a motion for new trial was heard and denied.

This is not a case where the doctrine of *res ipsa loquitur* applies. That plaintiff may recover, he must affirmatively prove negligence on the part of the defendant. The mere fact that the rung came off the ladder does not prove such negligence. It was essential that, in addition to this fact, plaintiff prove that the defendant as employer had not made a reasonable inspection of the ladder or had reasonable grounds to believe that it was defective. The defendant in this case has proven without contradiction that he did make all the inspection which a reasonable man could be asked to make, and that if this defective condition of the ladder did exist that plaintiff must have been aware of it.

We submit that the trial court, in denying the motion for a new trial in this case, was indeed stating the matter mildly when it said that "the evidence was not any too strong"; and that the case should properly have been taken from the jury at the close of the testimony and a verdict directed in favor of defendant.

III.

THE JUDGMENT IN THIS CASE SHOULD BE REVERSED UPON THE GROUND THAT THE VERDICT OF THE JURY WAS EXCESSIVE.

The judgment upon which a writ of error is taken out in this case was in the sum of $10,000. Plaintiff, at the time he was injured, was 68 years of age. The injuries claimed to have been suffered by him by reason of his fall, as has already been pointed out herein, were not serious, and the symptoms almost wholly subjective. Plaintiff was employed as a common laborer.

Under these circumstances, it is obvious that the jury, in awarding $10,000 damages, could not have been seeking merely to compensate plaintiff for the pecuniary value of the things which he had lost by reason of his injury, but must have been influenced by passion or prejudice against defendant. We submit that the judgment should be reversed upon this ground, or that plaintiff should be required to remit a substantial portion of the damage awarded him.

For the reasons set forth the District Court was in error in declining to instruct the jury to bring in a verdict for defendant, and was again in error in refusing to grant a new trial, or to modify the judgment, by reason of the excessiveness of the verdict.

Dated, San Francisco,
October 1, 1921.

Respectfully submitted,

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